No. 75-355

IN THE

Supreme Court of the United States

October Term, 1975

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE

JAMES V. RYAN
ROGER L. WALDMAN
One Rockefeller Plaza
New York, New York 10020

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
1666 K Street, N.W.
Washington, D. C. 20006

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Counsel for Petitioners

C. KENNETH SHANK, JR.
ALLAN J. GRAF
Webster Sheffield Fleischmann Hitchcock & Brookfield

ARTHUR F. MATHEWS
MICHAEL S. HELFER
Wilmer, Cutler & Pickering
Of Counsel

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REPLY BRIEF FOR PETITIONERS BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE

This brief is submitted by Petitioners Bangor Punta Corporation ("BPC"), Nicolas M. Salgo and David W. Wallace in reply to the Brief for the Respondent in Opposition to the Petitions for Certiorari submitted on behalf of Chris-Craft Industries, Inc. ("CCI") on October 20, 1975.

I

This case presents several important legal questions. CCI attempts to bury these questions, which the Court of Appeals itself found important and troubling,* by claiming, over and over and over, that this case involves "admitted" "massive" "fraud." CCI's claims, however, are wholly belied by the record.

The judgment against BPC was based entirely on two alleged violations, both of which were technical and in good faith, and neither of which was ever "admitted."** The first was a violation of Rule 10b-6. The District Court held that BPC's actions were not covered by the Rule. The Court of Appeals, over a strong dissent, disagreed on the law. But the Court of Appeals did not disturb the explicit findings of the District Court on remand that there was "not a scintilla of evidence that any Piper holder was misled" and that BPC's actions were "well within the spirit," although not the "literal terms," of an exemption from the Rule. (A-151) There was no fraud involved.

CCI's repeated assertions that BPC "defied" SEC warnings concerning Rule 10b-6 (*e.g.*, Response at 9) are also false. As a check of CCI's citations will show, the supposed SEC warnings to BPC consisted entirely of a private meeting between the SEC staff and a Mr. Siegel of CCI, of which BPC was unaware (A-13), plus an SEC press release proposing a new SEC Rule 10b-13, which rule is not involved in this action. (A-15-16) The SEC release

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* *Chris-Craft I* was reheard by the Court of Appeals *en banc* and produced a powerful dissent. *Chris-Craft II* produced separate opinions from each of the three judges who heard it, and Judge Timbers began the principal opinion by stating that the case "present[ed] important questions, some of first impression . . . ." (A-6)

** CCI's repeated assertion that the two violations are "admitted" by BPC is a misstatement. BPC believes, as very clearly stated in its Petition at 14, that "the decisions below on these points are wrong and that [BPC's] actions . . . were lawful."

commented briefly on the coverage of existing Rule 10b-6, but neither the parties nor any court ever found any precedent supporting that comment. (C-16) As Judge Lumbard noted on this specific issue, BPC "did not then know of any rule or interpretation precluding the transactions."* (C-22)

BPC's alleged violation of Section 14(e), the only other support for the judgment, did not involve fraud either. BPC omitted to describe an offer for the BAR that it had received and was considering. The District Court explicitly found that BPC "did not intentionally or purposefully mislead" Piper stockholders and that the omission "was not prompted by an improper purpose." (D-14) This explicit rejection of any claim of fraud was accepted by the Court of Appeals (A-37), which said: "Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith." (A-47)

CCI also carefully confuses the causation issue. The central fact is that after both of BPC's alleged violations, the contest for control of Piper was still open.** (C-9) CCI attempts to create the impression that without the technical violations BPC would not have acquired any of the shares involved and CCI would have acquired these shares. But the District Court found that there was no such proof. (A-145, 147) The Court of Appeals' assumption that BPC would not have acquired the Piper shares at issue arose solely from its interpretation of *Mills* and *Ute*. The

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* Nor did BPC buy Piper shares in "defiance" of its lawyers' advice, as CCI asserts. (Response at 23) As the record reference cited by CCI shows, it was the opinion of both BPC's in-house counsel and its outside counsel that the Rule did *not* apply to purchases of Piper stock by BPC. (1645A) Counsel advised that, taking "a conservative position," it would be "proper to buy shares of [Piper] but only if they were unsolicited and not over an exchange."

** CCI's assertion that "all the experts agreed" that BPC's 45-41% lead put BPC "realistically in an unbeatable position" (Response at 25-26) is wrong. Plaintiff's expert testified that the contest in August was a bidding contest, with victory available to the highest bidder. (2481A) Defendants' expert testified that BPC's 4% lead was not insurmountable. (2877A)

quotation relied upon by CCI (Response at 10) misleadingly omits the critical language which makes this clear. The full quotation is as follows:

> "Under the *Mills-Ute* test, we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers." (A-60, omissions underscored)

Thus, despite CCI's attempts at camouflage, the causation issue, like the other issues presented in BPC's Petition, is a recurring and important legal question worthy of this Court's attention.

II

CCI makes almost no response to the important legal questions presented by BPC's Petition.

Standing Under Rule 10b-6. This case presents the important question whether, under *Blue Chip Stamps,* CCI has an implied right of action for damages under Rule 10b-6. CCI neither bought nor sold the *BPC* securities that were the subject of the "distribution" that Rule 10b-6 regulates. CCI's argument that it would have been unlawful for CCI to have purchased *Piper* securities (Response at 21) is wholly irrelevant, since these were not the securities being distributed. CCI's argument that if it was injured it must have standing was, of course, rejected in *Blue Chip Stamps,* 95 S. Ct. at 1926-27.

Standing Under Section 14(e). This case presents the important question whether, under *Rigsby, Cort* and *Rondeau,* CCI has an implied right of action for damages under Section 14(e). CCI's only response is to assert that, although the prospectus was not directed at CCI, and CCI did not accept the offer made by it, CCI has an implied right of action because "Section 14(e) protects *all* parties involved in a control contest." (Response at 20) CCI purports to derive its conclusion from *Rondeau* and some legislative history, neither of which provides CCI any support whatsoever. If CCI were right, then each contestant in a takeover contest could sue each of the other contestants,

the target and its management; shareholders of the target could sue the target and each contestant; and anyone else "involved" could sue too. Surely this Court will want to decide whether all these causes of action can properly be implied from Section 14(e), in disregard of *Rigsby* and *Cort*.

Scienter. This case presents the important question whether scienter to support an implied damage action under the 1934 Act exists where there has been a trial court finding, undisturbed on appeal, that the defendant acted in good faith and without intent to defraud or mislead. (A-37, 47, 97-100, 117-123; D-14) While *Chris-Craft II* contains an extended theoretical discussion of scienter with several different formulations of the standard, the holding was that mere knowledge of an omitted fact later held material is sufficient to support damage liability, no matter how careful or otherwise blameless the defendant was. (A-37, 106-107) This legal, not factual, conclusion is of first importance.

Causation. This case presents the important question whether CCI has the right to a presumption, in the face of an explicit contrary finding by the trier of fact (A-145, 147), that in the absence of BPC's violations BPC would have acquired none of the 14% of Piper stock involved. CCI explicitly and repeatedly begs this question by itself presuming that absent the technical violations BPC would never have acquired any such stock. Whether there should be a presumption of that kind is precisely the legal question presented, and it is one of major importance to the continuing development of the *Mills* doctrine.

Damages. CCI makes no effort to explain how the Court of Appeals' measure of damages is related—as it must be under Section 28(a) of the 1934 Act—to the actual damages suffered by CCI on account of the denial of CCI's opportunity to compete for control. CCI's only response is to assert, repeatedly and falsely, that BPC does not challenge the legal principles used by the Court of Appeals to determine damages. (Compare Response at 35 with Petition at 27-30.) CCI's reluctance to discuss the measure of dam-

ages undoubtedly stems from the District Court's finding, after a trial, that the majority position in Piper was worth at most 10% more than the minority block and that CCI's *opportunity* to gain control was "generously valued at 5% above fair value of the [Piper] stock" (B-70)—sums that are a small fraction of the $36 million awarded. CCI's attempt to portray the Court of Appeals' fifteen-fold increase in damages (giving CCI many times more than it would now have if it had won the contest) as a matter of "arithmetic," rather than a last-minute change of theory, is clearly indefensible.

Conclusion

For the reasons stated in the Petition, a writ of certiorari should issue.

Respectfully submitted,

JAMES V. RYAN
ROGER L. WALDMAN
One Rockefeller Plaza
New York, New York 10020

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
1666 K Street, N.W.
Washington, D. C. 20006

C. KENNETH SHANK, JR.
ALLAN J. GRAF
Webster Sheffield Fleischmann Hitchcock & Brookfield

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Counsel for Petitioners

ARTHUR F. MATHEWS
MICHAEL S. HELFER
Wilmer, Cutler & Pickering
Of Counsel

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